(2) the three-part Establishment Clause test announced by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was not applicable to constitutional challenges to legislative invocations because of the long and widespread historical practice of invocations, *Id.* at 786;

(3) the selection of a clergyman to give invocation prayers that invoke Divine guidance on a legislative body "is not by its historic nature proselytizing activity" and does not "symbolically plac[e] the government's 'official seal of approval on one religious view'," 463 U.S. at 791-92; and

(4) choosing the clergyman of a single Judeo-Christian denomination to give an invocation – and excluding other religious leaders – is not an endorsement of any specific religion and does not "advance[] the beliefs of any particular church." *Id.*[7]

Thus, under *Marsh*, it is permissible to deny someone the opportunity to give a legislative prayer if the prayer "falls outside the long accepted genre of legislative prayer", a genre "often taking the form of invocations that reflect a Judeo-Christian ethic . . . " *Snyder v. Murray City Corporation*, 159

[7] Simpson attempts to distinguish *Marsh* from this case by noting that Nebraska selected a single, paid chaplain to perform its invocations while Chesterfield uses numerous, unpaid volunteer clergy. However, the *Marsh* Court specifically recognized that legislative bodies have employed a wide variety of processes for selecting clergy to give invocations, including practices such as Chesterfield's practice of using rotating, unpaid clergy. Neither this Court nor the Fourth Circuit saw an Establishment Clause problem with any of these practices. *Id.* at 794, n.18.

F.3d 1227, 1234 (10th Cir. 1998). Accordingly, Simpson cannot give an invocation that falls within the long-accepted genre of legislative prayer endorsed in *Marsh*, a fact which Simpson confirmed in her Complaint by alleging that if allowed to give a prayer, she would not invoke the guidance of any divinity whatsoever. (J.A. p. 10)

Simpson contends that this case is not governed by *Marsh*, characterizing the Fourth Circuit Court's opinion as "legal smoke and mirrors". Instead, she argues that it is controlled by *Lemon*, *Larson v. Valente*, 456 U.S. 228 (1982) and their progeny.[9] *See*, Petition for Writ of Certiorari, pp. 4-7. Simpson's claim is at odds with this Court's own analysis of *Marsh*, *Lemon*, *Larsen* and Establishment Clause law as it relates to legislative invocations. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583, n.4 (1987) ("The Lemon test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers* . . . "); *Lynch v. Donnelly*, 465 U.S. 668, 697 (1984) (Brennan. J., dissenting) ("the fact remains that *Marsh v. Chambers* is the only case in which the Court has not applied either the *Lemon* or a 'strict scrutiny analysis' ") *Marsh v. Chambers*, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry into the Establishment Clause"). As one member of this Court has observed:

> . . . the existing legislative prayer practice, *Marsh* plainly indicates, fits into a special nook –

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[9] Simpson now inexplicably refuses to cite *Lemon* by name in her petition. She does, however, cite multiple cases which employ the *Lemon* test, such as the Court's recent opinion in *McCreary County v. ACLU of Kentucky*, 545 U.S. ___, 125 S. Ct. 2722 (2005).

> a narrow space tightly sealed off from otherwise applicable first amendment doctrine. As to the establishment clause, Justice Brennan described *Marsh* as "carving out an exception . . . rather than reshaping . . . doctrine to accommodate legislative prayer. (citations omitted)

Kurtz v. Baker, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (Ginsburg, J., dissenting)

In light of this overwhelming weight of authority, Judge Wilkinson, writing for the Fourth Circuit, properly rejected Simpson's contention and analyzed this case in accordance with the controlling authority established by *Marsh*.[6] In undertaking a *Marsh* analysis, the Fourth Circuit observed that the analysis requires both an inquiry into the substance of the invocations themselves and into

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[6] The Fourth Circuit has declined to apply Marsh outside the realm of legislative prayer; *see, North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (*Marsh* not applicable to invocation given from bench by state court judge) and *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (*Marsh* not applicable to supper prayer at state-supported university). However, even Simpson's counsel admitted before the district court in *Mellen* that *Marsh*, and only *Marsh*, applies when testing the constitutionality of legislative prayer:

> As to legislative prayer, it was approved by the same Congress that adopted the First Amendment, and at approximately the same time. In the [*Marsh*] Court's view, this "unique history" demonstrated the Framers' intent so conclusively that it was not necessary to apply *any* of the usual Establishment Clause tests. (Plaintiff's Reply in Support of Motion for Summary Judgment, p. 10, fn. 9. (Emphasis in original)).

Simpson's counsel was even more emphatic before the Fourth Circuit in *Mellen*: "*Marsh* is sui generis." (Brief of Appellees, p. 47.)

the process by which clergy are selected to give invocations.

To test the propriety of the substance of invocations given to Chesterfield's legislative body, Judge Wilkinson employed the standards enunciated in *Marsh*: (1) whether the prayer fits within the genre of legislative prayer that 'has become part of the fabric of our society . . . ' *Snyder*, 159 F.3d at 1233, quoting *Marsh*, 463 U.S. at 792; and (2) whether there were indications "that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. The court noted the diverse, non-sectarian nature of invocations given to the County's Board of Supervisors over time, invocations which the trial court itself found to be no more than "brief, benign pronouncements of simple values that are not controversial nor confrontational". 292 F. Supp. 2d at 820. Judge Wilkinson found that these nonsectarian invocations were solidly "within the genre of legislative invocational prayer that 'has become part of the fabric of our society'." 404 F.3d at 282-83.

The court also found that the prayer opportunity had not been used to proselytize or advance any particular religion or to disparage any particular religion. The court specifically noted that clergy of multiple faiths had used the invocation opportunity to describe the divinity "in wide and embracive terms" such as "Lord God, our creator," "giver and sustainer of life," "the God of Abraham, of Moses, Jesus, and Mohammed," "Heavenly Father," "Lord our Governor," "mighty God," "Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator". *Id.* at 284.

Having determined that the substance of invocations given under Chesterfield's invocation policy meets the test prescribed by *Marsh*, the Fourth Circuit turned its attention to the County's process for selecting prayer-givers. In doing so, Judge Wilkinson acknowledged the following language in *Marsh*:

> We, no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.

Marsh, 463 U.S. at 793. The court noted that the County's selection practice has resulted in invocations being given by Islamic imams, Jewish rabbis, representatives of Jehovah's Witness congregations, and of other independent churches, a much wider variety of religious leaders than a single Protestant minister. Since *Marsh* had held that the selection of a single Presbyterian minister to give invocations did not advance a particular religion, the Fourth Circuit held that the County's use of a wide cross section of Protestant, Catholic, Islamic, Jewish and independent religious leaders also could not constitute advancement of a particular religion. In summary, the Fourth Circuit concluded that the County's invocation policy did not advance, proselytize or disparage any particular religion and ensured that legislative prayers to the Board were within the nonsectarian, Judeo-Christian tradition which this Court held to be constitutionally appropriate in *Marsh*. The County's selection process for prayer-givers was significantly more inclusive than the process affirmed in *Marsh* and guaranteed broad representation by the County's religious leaders. Under *Marsh*, Judge Wilkinson was correct when he declared the

County's invocation practice to be "constitutionally unremarkable." 404 F.3d at 283-84.

B. Both of the Circuits That Have Considered Post-*Marsh* Challenges to Legislative Invocations Applied *Marsh* Consistently and Correctly.

Since this Court's 1983 decision in *Marsh*, only two Federal Circuit Courts have decided constitutional challenges to the practice of legislative prayer. This fact is paradoxical given the pervasiveness of invocations before federal, state and local legislative bodies throughout the United States. Nonetheless, the dearth of appellate decisions on invocations could have been anticipated given the clarity of the *Marsh* decision and the relative ease with which it can be constitutionally applied by legislatures within the historic tradition of legislative prayer. The only two federal appellate courts who have decided invocation challenges since *Marsh*, the Fourth and Tenth Circuits, applied *Marsh* both consistently and correctly.[10]

In a curious omission, Simpson's petition does not even mention the Fourth Circuit's only other post-*Marsh* invocation case, *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005). In *Wynne*, a town council had made the purposeful decision to

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[10] A third invocation case, *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987) was decided on procedural (standing) rather than substantive grounds. Another case, challenging the payment of salaries and expenses of Congressional chaplains, which was pending before the Court of Appeals for the D.C. Circuit when *Marsh* was decided, was summarily dismissed by the court in light of *Marsh*. *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983).

give "pervasively and exclusively sectarian" invocations at council meetings in which the town's citizens actively participated. Rather than attempt to adhere to *Marsh's* requirement that invocations must be nonsectarian prayers which neither advance nor disparage religion, Great Falls' town leaders resolutely, and admittedly, chose to begin meetings with Christian worship (which they themselves led and in which the public was invited to participate), to insist on the exclusive and repeated invocation of Jesus Christ by name and, when challenged, to assert (via the town mayor), "this is the way we've always done things and we're not going to change." 376 F.3d at 295.

The Fourth Circuit had little difficulty finding that the Great Falls Town Council had improperly exploited its legislative prayer opportunity and advanced one religion over others in violation of *Marsh*. As Judge Wilkinson wrote, "The insistent sectarianism of the Great Falls prayers . . . violated even the spacious boundaries set forth in *Marsh*." 404 F.3d at 284.[11]

Likewise, the Tenth Circuit in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (en banc), fully

[11] Judge Wilkinson noted that, in contrast to the town council in *Wynne*, the Chesterfield Board of Supervisors "has aspired to nonsectarianism and requested that invocations refrain from using Christ's name or, for that matter, any denominational appeal. . . . Chesterfield's openness to this ecumenism is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance. . . . [T]he restraints made plain in the Board's policy and respected by those who lead invocations ensure that prayers do not 'proselytize or advance any one, or [] disparage any other, faith or belief,' . . . and therefore are constitutionally sound." 404 F.3d at 284, quoting *Marsh*, 463 U.S. at 794-95.

embraced *Marsh* to hold that a citizen could constitutionally be denied the opportunity to give a prayer at a city council meeting if that prayer fell outside the "long-accepted genre" of legislative prayer. This "genre", which is discussed at length in *Marsh*, reflects a Judeo-Christian ethic and serves as a nonsectarian request for wisdom, solemnity and divine blessing on the legislative body. *Id.* at 1234. Snyder claimed (like Simpson here) that, by preventing him from offering his invocation prayer "Murray City has impermissibly preferred one religion over another." As the Tenth Circuit defined the task before it, "We must decide if this is so."

To reach its decision the Tenth Circuit announced its reliance on, and adherence to, the principles of *Marsh* early in its decision: "[T]he mainline body of Establishment Clause case law provides little guidance for our decision in this case. Our decision, instead, depends on our interpretation of the holding in *Marsh*." *Id.* at 1232. The Tenth Circuit ultimately concluded, consistent with *Marsh*, that Murray City "has the power to open its meetings with the kind of legislative prayer that our nation over the course of more than 200 years has come to see as 'tolerable' ". *Id.* at 1236. This "tolerable" expression of legislative prayer was defined in *Marsh* as the invocation of Divine guidance and the "acknowledgement of beliefs widely held among people of this country." *Id.* at 1233, quoting *Marsh*, 463 U.S. at 792.

The court concluded that Snyder's prayer did not fall within this historic genre of legislative prayer and, in addition, was disparaging in content. Either reason was sufficient for the city to deny Snyder's request to give his prayer. 159 F.3d at 1235. In fact, the court held, based on the method upheld in *Marsh* of selecting a single

Protestant minister from a single Protestant denomination to give invocations for over a decade, "there can be no Establishment Clause violation in the fact that a legislative body chooses not to appoint a certain person to give its prayers." *Id.* at 1233. According to Simpson, the *Snyder* court suggests that the result in *Snyder* would have been different if Snyder "had been excluded because of his religion." (Petition at 11.) *Snyder* neither suggests nor implies such a hypothetical result. To the contrary, *Snyder* states, citing *Marsh*, that the selection of a prayer-giver is only impermissible if the selection is made for an impermissible motive, that is, to proselytize a particular faith, disparage another faith or establish a particular religion as the official religion of the legislature. *Id.* at 1234, citing *Marsh*, 463 U.S. at 793-95. The court concluded that "under *Marsh* there is no 'impermissible motive' when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer. The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose." 159 F.3d at 1234.

In short, the only two courts of appeals that have decided post-*Marsh* legislative invocation challenges have consistently applied the decisional principles of *Marsh* to reach consistent decisions.[12] Both courts have acknowledged

[12] Simpson also suggests that there is "split in the circuits" because there are legal disagreements among the majority, concurring and dissenting opinions in *Snyder*. The majority decision in *Snyder* is the decision in *Snyder* every bit as much as the majority decision in *Marsh* is the decision in *Marsh*. As Judge Wilkinson wrote in *Simpson* about Justice Brennan's dissenting opinion in *Marsh*: "We are of course governed not by the dissent, but by the majority. Thus we must follow

(Continued on following page)

the historically-accepted genre of legislative prayer described and upheld in *Marsh*. Both courts have consistently applied *Marsh's* prohibition against invocations that proselytize, advance or disparage a particular religion. Both courts have consistently held that the selection of a prayer-giver, in the absence of such an "impermissible motive," is, as *Marsh* holds, "constitutionally unremarkable." 404 F.3d at 283-84, citing *Marsh*, 463 F. 2d at 794-95. The decisions of these courts demonstrate that, far from being in a state of "bewilderment" as Simpson claims, the courts understand from *Marsh* when an invocation practice must be invalidated under the Establishment Clause (*Wynne*) and when an invocation practice passes constitutional muster (*Simpson* and *Snyder*). The Fourth and Tenth Circuits have proven that *Marsh* is capable of being applied appropriately and without "bewildering" difficulty. There is no split in the circuits that needs to be mended by this Court.

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the rubric announced in *Marsh* itself, and not the tests it rejected, in the limited context of legislative prayer." 404 F.3d at 281.

CONCLUSION

Simpson has not presented, as she must do under Rule 10 of this Court, any compelling reason why this case should be reviewed on a writ of certiorari. For the reasons stated above, the County respectfully requests that Simpson's petition be denied.

Respectfully submitted,

STEVEN L. MICAS
Chesterfield County Attorney
9901 Lori Road, Suite 503
P. O. Box 40
Chesterfield, Virginia 23832
Telephone: (804) 748-1491
Facsimile: (804) 717-6297

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In the Supreme Court of the United States

CYNTHIA SIMPSON,

Petitioner,

v.

CHESTERFIELD COUNTY BOARD OF SUPERVISORS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE HINDU AMERICAN FOUNDATION, BUDDHIST PEACE FELLOWSHIP, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, AND THE INTERFAITH ALLIANCE AS AMICI CURIAE IN SUPPORT OF PETITIONER

SUHAG A. SHUKLA
Hindu American Foundation
106 Hoover Boulevard
Tampa, FL 33602

EVAN M. TAGER
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF THE AMICI CURIAE

Amicus Curiae Hindu American Foundation is a human-rights group whose purpose is to provide a voice for this nation's growing number of Hindu Americans. A central function of the HAF is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch.[1]

Amicus Curiae Buddhist Peace Fellowship seeks to contribute a Buddhist perspective to social and policy matters by, among other things, furthering the values of wisdom, compassion, and peace. Founded in 1978, BPF has more than 4,000 members in 45 chapters in the United States and abroad.

Amicus Curiae Association on American Indian Affairs is a private organization governed by an all-Native American Board of Directors. Its mission is to promote the welfare of American Indians and Alaska Natives by supporting efforts to sustain and perpetuate their cultures, protect their sovereignty, constitutional, legal and human rights, and natural resources and improve their health, education, and economic and community development. The Association has long been involved in efforts to protect the religious freedom and sacred lands of Native Americans.

Amicus Curiae The Interfaith Alliance is a national grassroots organization of over 150,000 individuals of faith and goodwill drawn from more than 75 different religious traditions or beliefs — including Christianity, Judaism, Islam, Hinduism, Buddhism, Native American religions, Wicca, and others. Dedicated to promoting mutual respect, cooperation

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[1] Pursuant to Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the amici curiae, their members, and their counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

and civility, TIA strives to promote religion as a positive and healing force in the life of the Nation.

As adherents of non-Judeo-Christian religions, Hindu Americans, Buddhist Americans, and Native Americans have a direct interest in this case. They, like all Americans, are guaranteed religious freedom by the religion clauses of the First Amendment. The ability of these minority religious groups to take part equally in American civic life, a fundamental freedom protected by the religion clauses, is threatened by the Fourth Circuit's holding that the Establishment Clause does not prohibit governments from excluding non-Judeo-Christian clergy from eligibility to offer legislative invocations. The Amici Curiae represented in this brief therefore have a strong interest in urging this Court to grant the petition for certiorari and reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Circuit held that the Establishment Clause is no impediment to allocating the right to deliver invocations at the beginning of public sessions of local legislative bodies based exclusively on the religion of the applicant. In this particular case, the local government expressly limits the right to deliver invocations to representatives of monotheistic religions in "the Judeo-Christian tradition" (Pet. App. 5-6, 32), while excluding representatives of all other religions, including Hinduism, Buddhism, and Native American religions. Hence, if the Dalai Lama were to request the opportunity to present an invocation before an open session of the Chesterfield County Board of Supervisors, he would be turned away — and under the Fourth Circuit's understanding of the Establishment Clause, there would be nothing wrong with that.

And yet nothing could more squarely implicate the core concerns underlying the Establishment Clause than discriminating among religions in the distribution of government favors. Not only is religious favoritism precisely the evil that

the Establishment Clause was aimed at precluding, but the task of determining whether a particular religious sect is monotheistic or "in the Judeo-Christian tradition" is clearly one that the Framers saw to be a theological function, not a governmental one. Governments are extraordinarily poorly suited to be arbiters of theology, and when they arrogate that role, nothing good can come of it. Not only are they certain to err, but they cannot help driving wedges between religions and between denominations of the same religion.

The decision of the Fourth Circuit eviscerates the Establishment Clause's prohibition against discriminating among religions — at least in the area of legislative prayer. The Court should grant certiorari to correct this misguided and deleterious exception to the fundamental precept that government may not discriminate on the basis of religion.

ARGUMENT

A. Allocating The Privilege Of Delivering A Legislative Prayer On The Basis Of Religion Violates The Core Purpose Of The Establishment Clause.

This case involves questions that go to the heart of our national identity. This country was founded upon the principle of religious liberty. But from time to time we have strayed from that polestar to the disadvantage of adherents of minority religions.[2] The exclusion of these groups from participation in important aspects of public life — including civic rituals, like those conducted by respondent, that are open to majority faiths — communicates societal disdain for minority beliefs.

As Justice Breyer has noted, government favoritism among religions is impermissible because it may "work deterrence" of the disfavored beliefs. *Van Orden v. Perry*, 125

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[2] See, *e.g.*, Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 927 (2004) (giving historical examples of violent attacks on religious minorities).

S. Ct. 2854, 2868 (2005) (Breyer, J., concurring) (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)). Such deterrence is, of course, the result of the (accurate) perception of religious minorities that their beliefs are scorned by their own government and render them vulnerable to marginalization. Prevention of such governmental discrimination was an animating principle behind the First Amendment:

> The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters * * *, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists).

McCreary County v. Am. Civil Liberties Union, 125 S. Ct. 2722, 2742 (2005) (internal citation omitted). See also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (observing that the Bill of Rights was meant "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials"); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (Arthur Goldhammer trans., Library of America 2004) (1835) (describing the Constitution as a countermajoritarian document intended largely to protect minorities from the "tyranny of the majority").

Indeed, the Framers believed that religious minorities were to be not just protected but prized, because religious diversity contributes to the security of religious freedom. See THE FEDERALIST NO. 51 (James Madison) ("In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.").

For such reasons, Justice Iredell defended the Constitution's prohibition on religious tests (Art. VI, cl. 3) during the ratification debates in North Carolina:

> [I]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?

4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (1836).

Moreover, the Founders believed that state-sponsored religion posed as great a threat to the freedom of conscience as did physical coercion:

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that *one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.* They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power.

Engel v. Vitale, 370 U.S. 421, 429 (1962) (emphasis added). See also *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968) ("Government in our democracy, * * * may not aid, foster, or promote one religion or religious theory against another or